# **United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL**

### Advice Memorandum

DATE: February 25, 2008

TO : Dorothy L. Moore-Duncan, Regional Director

Region 4

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Metropolitan Regional Council of Carpenters,

Southeastern Pennsylvania, State of

Delaware, and Eastern Shore of Maryland 584-5000 and 584-5014

General Building Contractors Association 584-5042

Case 4-CE-136 584-5056

The Region submitted this Section 8(e) case for advice as to whether a union signatory subcontracting clause is lawful under the construction industry proviso where: (1) the general contractors bound by the clause either employ or intend to employ workers who perform unit work; (2) the Union has invoked the clause to acquire work performed by other trades; and (3) the clause restricts the general contractors from doing business with subcontractors whose employees are represented by other building trades unions.

We conclude that the Region should dismiss the charge, absent withdrawal. The general contractors that are signatory to the clause have a collective bargaining relationship with the Union and, notwithstanding the Charging Party's assertions, there is no evidence that any of them do not employ or intend to employ workers performing carpentry work. Furthermore, the fact that the Union may be applying this clause to capture work traditionally performed by members of other unions is irrelevant because the construction industry proviso protects secondary job-site clauses. Finally, the construction industry proviso was intended to privilege, among others, subcontracting clauses which require subcontracting with signatories to one union's contracts rather than signatories to another union's contracts.

#### **FACTS**

The Metropolitan Regional Council of Carpenters, Southeastern Pennsylvania, State of Delaware and Eastern Shore of Maryland, United Brotherhood of Carpenters and Joiners of America ("the Union" or "the Carpenters") have a collective-bargaining agreement with the General Building Contractors Association, Inc. ("the Association") effective May 1, 2006 to April 30, 2009. Article 12 of that

contract, entitled "Subcontracting of Job-Site Work,"
provides:

The Employer agrees that he will not subcontract any work which is covered by this Agreement that is to be done at the site of any job to which this Agreement is applicable, except to a contractor bound by the terms of this Agreement.

On November 30, 2007, the Penn-Del-Jersey Chapter, National Electrical Contactors Association ("the Charging Party" or "NECA") filed the charge in this case, alleging that the Association and the Union entered into and applied Article 12 in violation of Section 8(e) insofar as it has been applied outside a collective-bargaining relationship to general contractors who do not employ or intend to employ employees to perform work within the Carpenters' jurisdiction. NECA also alleges that the Union has applied the clause to acquire work traditionally performed by other trades, as well as to prohibit subcontracting relationships with other unions which was an issue that did not exist in 1959 and therefore was not intended to be protected by the construction industry proviso.

With one exception (CREI), all of the targeted general contractors are members of the Association and therefore signatory to the Carpenters/Association collective-bargaining agreement. Although not a member, CREI has a separate collective-bargaining agreement with the Carpenters. The Charging Party has not submitted any evidence in support of its assertion that some Association members bound to the Carpenters collective-bargaining agreement do not employ or intend to employ workers who perform carpentry work. In fact, the only evidence offered on this issue involved two Association members which admittedly employ workers represented by the Carpenters.

The Charging Party's witnesses, an Ironworkers Local 401 business agent/organizer and an IBEW Local 98 business representative, testified about several instances when the Carpenters allegedly used Article 12 to obtain work traditionally performed by employees represented by the Ironworkers or the IBEW. The Ironworkers representative described three instances when the Carpenters allegedly claimed jurisdiction over work that originally was subcontracted to an employer with a collective-bargaining agreement with the Ironworkers, involving the installation of overhead doors and of "decorative nosing," plates, and angles on stairs. The IBEW representative presented four examples when the Carpenters allegedly claimed work that had been subcontracted to NECA subcontractors, including the moving and installation of electrical appliances, and

the installation of plywood backing for electrical equipment and magnetic door locks for fire alarm systems.

#### ACTION

We conclude that the Region should dismiss the charge, absent withdrawal, because Article 12 is lawful on its face and as applied under the construction industry proviso to Section 8(e). The Charging Party's arguments are nonmeritorious for the reasons set forth below.

#### The Existence of A Collective-Bargaining Relationship

In <u>Connell Construction</u>, <sup>1</sup> the Supreme Court held that a union signatory subcontracting clause with "stranger" contractors, outside a collective-bargaining relationship and not limited to any particular jobsite, is not protected by the construction industry proviso and therefore violates Section 8(e). In that case, the union had specifically disclaimed any interest in representing the general contractors' employees and insisted upon the subcontracting clause as a tool to organize mechanical subcontractors in the Dallas area.<sup>2</sup>

Citing Connell Construction, the Board recently held that a union's agreements containing union signatory clauses with an owner-operator of a power facility, Indeck, and its general contractor violated Section 8(e) because the agreements were not negotiated in the context of either a Section 8(f) or a Section 9(a) collective-bargaining relationship.<sup>3</sup> The Board relied upon the fact that Indeck had no employees in the building and construction trades and neither Indeck nor its general contractor intended to employ any trade employees on the relevant jobsite.<sup>4</sup> Moreover, the agreements were executed to obtain the union's support in securing regulatory approval for the project and not to resolve the problems associated with union and nonunion employees working together at a common construction site.<sup>5</sup>

<sup>1 &</sup>lt;u>Connell Construction Co. v. Plumbers</u>, 421 U.S. 616, 631-33 (1975).

 $<sup>^{2}</sup>$  Id. at 619, 631.

 $<sup>^3</sup>$  Glens Falls Building & Construction Trades Council, 350 NLRB No. 42, slip op. at 5 (2007).

<sup>4</sup> Ibid.

<sup>&</sup>lt;sup>5</sup> Ibid.

There is no evidence here that any of the Association members do not either employ or intend to employ workers who perform carpentry work. Therefore, the holdings of Connell Construction, where the union had disclaimed representation of the general contractor's employees, and Glens Falls, where the general contractors neither employed nor intended to employ construction workers, do not apply here. The Carpenters are not applying a union signatory clause reached with "stranger" contractors but rather have a collective bargaining relationship with the Association members and CREI, embodied either in Section 9(a) or Section 8(f) agreements.

#### Proviso Protection Regardless of Secondary Object

The construction industry proviso protects union signatory clauses that would otherwise be unlawful under Section 8(e) because they have a secondary rather than a primary work preservation object. Thus, it is irrelevant whether or not the Union is applying Article 12 for a work preservation object. Moreover, the Region has determined that even if the Charging Party's witnesses are credited, the work in dispute is work that has been performed by the Union's members.<sup>7</sup>

<sup>6</sup> See, e.g., Iron Workers (Southwestern Materials), 328 NLRB 934, 936-37, 938 (1999) (finding lawful a clause providing: "The Employer agrees not to sublet any work under the jurisdiction of the Association or its local unions—to any person ... not in [a] contractual relationship with this Association or its affiliated Local Unions"). Cf. National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612, 638-39 (1967) (construction industry proviso "was intended ... to allow agreements pertaining to certain secondary activities on the construction site").

<sup>&</sup>lt;sup>7</sup> See, e.g., <u>Electrical Workers Local 98 (NFF Construction)</u>, 332 NLRB 1262, 1264 (2000) (awarding the moving and installation of televisions, minibars, and microwaves at two Philadelphia hotels to employees represented by the Carpenters); <u>Electrical Workers Local 98 (AIMM, Inc.)</u>, 331 NLRB 1075, 1077 (2000) (awarding the moving and installation of refrigerators and television sets at Philadelphia hotel to Carpenters-represented employees).

## Proviso Protection Regardless of Prohibition on Subcontracting to Signatories of Another Union's Contract

There is no basis to the Charging Party's contention that Article 12 is beyond the scope of the proviso because it precludes general contractors from doing business with subcontractors whose employees are represented by other building trades unions. Examining the legislative history of Section 8(e) at length in Woelke & Romero, the Supreme Court found that the House Labor Committee heard testimony that then-existing subcontracting clauses denied "employers whose employees had selected another union" opportunities to compete for jobs. 9 Nevertheless, Congress proceeded to enact the proviso to protect such "broad" subcontracting clauses which were "part of the pattern of collective bargaining prior to 1959[.]"10 In reaching its decision that that the proviso's protection is not limited to jobsites at which the signatory union workers are employed, the Court also noted that, "the problem of jobsite friction between union and nonunion workers" was only one of Congress' concerns. 11 Accordingly, the Union's application of Article 12 to prevent the subcontracting of work to subcontractors employing workers represented by other unions was clearly contemplated by the Congress that enacted Section 8(e) in 1959 and is therefore protected by the proviso. 12

Therefore, the Region should dismiss the charge, absent withdrawal.

B.J.K.

<sup>&</sup>lt;sup>8</sup> See <u>Woelke & Romero Framing</u>, <u>Inc. v. NLRB</u>, 456 U.S. 645, 652-60 (1982) (holding that the proviso's protection is not limited to jobsites at which the signatory union workers are employed).

<sup>&</sup>lt;sup>9</sup> Id. at 658.

 $<sup>^{10}</sup>$  Id. at 660.

<sup>&</sup>lt;sup>11</sup> Id. at 662.

<sup>12</sup> Cf. Carpenters District Council of Northeast Ohio (Alessio Construction), 310 NLRB 1023, 1027-29 (1993) (proviso does not protect anti-dual shop clauses, which differ from those in existence in 1959).